

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



October 18, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

RECEIVED

OCT 19 1994

Re: PR Docket No. 94-105

FCC MAIL ROOM

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the following REPLY TO OPPOSITION OF CTIA TO CPUC EMERGENCY MOTION TO COMPEL PRODUCTION OF INFORMATION in the above-referenced proceeding.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine
Principal Counsel

ESL:cip

Enclosure (13)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

OCT 19 1994

In the Matter of)
)
Petition of the People of the)
State of California and the)
Public Utilities Commission)
of the State of California)
to Retain Regulatory Authority)
over Intrastate Cellular Service)
Rates)
_____)

FCC MAIL ROOM

PR Docket No. 94-105

REPLY TO OPPOSITION OF CTIA TO CPUC EMERGENCY MOTION
TO COMPEL PRODUCTION OF INFORMATION

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby reply to the opposition filed by the Cellular Telecommunications Industry Association ("CTIA") to the CPUC Emergency Motion To Compel Production of Information.¹ CTIA provides no legitimate basis for refusing to disclose any and all information reviewed or relied upon in its opposition to the CPUC petition, nor is there any.

CTIA does not dispute that the regression analysis submitted by Jerry A. Hausman ("Hausman") in an affidavit on behalf of CTIA is based on pricing and carrier-specific subscriber data. CTIA also does not dispute that Hausman failed to disclose this data, which was a material input into his

1. The CPUC also filed a Motion to Strike Affidavit and Testimony of Jerry A. Hausman Appended to And Discussed in the Opposition of CTIA (dated September 29, 1994).

regression analysis, and comprised the basis for the results produced by that analysis. Nor did Hausman disclose other data he reviewed or relied upon in undertaking his study on behalf of CTIA.

CTIA now contends that, despite its reliance on Hausman's study as the principal basis for opposing the CPUC petition, and despite the CPUC's request for all information reviewed or relied upon by Hausman in undertaking his study, CTIA has no legal responsibility to produce such information. CTIA cites three reasons for its refusal, none of which has any merit.

First, CTIA claims that its status as a trade association shields it from any requirement to produce data given by its individual cellular carrier members for Hausman. It then claims that the CPUC must contact each of CTIA's members who gave data to Hausman and negotiate with each member for the production of such data.

CTIA cites no lawful basis for this claim because there is none. Where, as here, CTIA is sponsoring Hausman's testimony and has placed such testimony in the record in this proceeding, CTIA, as the sponsoring party, must produce the facts and data which underlie that testimony. CTIA cannot circumvent this requirement on the basis that its members, and not CTIA, generated the underlying facts and data. Cf. Federal Rules of Evidence, Rule 705. In this case, to permit CTIA to shield itself from this requirement would effectively deny the CPUC the opportunity to rebut fully CTIA's opposition.

Specifically, CTIA represents hundreds of cellular carriers. At least 60 of its members gave Hausman pricing and carrier-specific subscriber data which Hausman apparently used in his regression analysis for the top 30 cellular markets in the nation. In fact, since Hausman's analysis included an indeterminate number of RSAs, an unknown additional number of CTIA members also gave Hausman data for his regression analysis.

Against this backdrop, CTIA believes that the CPUC has the burden of contacting at a minimum 60 of CTIA's members, and perhaps scores more, to obtain the pricing and carrier-specific subscriber data that Hausman used in his analysis on behalf of all of CTIA's members. Moreover, to the extent that Hausman reviewed a larger data set (i.e., all MSAs or the top 60 MSAs), CTIA would place the burden on the CPUC to contact hundreds more of CTIA's carrier members nationwide.

Further, CTIA apparently expects that the CPUC could obtain access to the data from all of these carriers, and could review and analyze this data all in a period of just thirteen working days (from September 29, 1994, the date of CTIA's response to the CPUC data request of September 26, 1994 through October 18, 1994, the date upon which the CPUC must file its reply to CTIA's opposition). Obviously, as a practical matter, this is impossible. CTIA thus seeks to effectively deny, and in fact has denied, the CPUC's right and opportunity to rebut in full Hausman's testimony sponsored by CTIA.

CTIA next argues that the CPUC "already has access to the California market data at issue ..." CTIA at 6. This argument is curious because it assumes that the CPUC is aware of the

specific data for California carriers that CTIA relied upon. The CPUC, however, cannot possibly know without reviewing CTIA's data whether such data is in fact identical to whatever data the CPUC has.²

CTIA argues further that, to the extent that data it relied upon is proprietary, the CPUC must file a Freedom of Information Act ("FOIA") with the Federal Communications Commission ("FCC") to request access thereto. This argument is likewise curious because CTIA never filed this data with the FCC. Hence, there is nothing for the FCC to disclose and, thus, the FOIA is inapplicable.³

CTIA's final argument is that the CPUC is not entitled to the data and information underlying CTIA's opposition because the instant proceeding is not an adjudicatory proceeding. This argument is meritless. As the CPUC explained in its Motion to Strike Affidavit and Testimony of Jerry A. Hausman Appended to and Discussed in the Opposition of CTIA, as a matter of fairness and due process, the CPUC has a legal right in a rulemaking proceeding to review and respond to all information, whether public or proprietary, which was reviewed or relied upon by those in opposition to the CPUC petition. Home Box Office, Inc. v.

2. This also assumes that CTIA has not adjusted its undisclosed data in any way, including omitting certain data from its analysis.

3. In contrast, the CPUC filed its petition which contained information considered proprietary by cellular carriers under seal with the FCC. The information is thus before the FCC, and is subject to FOIA requests for disclosure.

FCC, 567 F.2d 9, 54 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) ("Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those 'in the know' is intolerable."); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2nd Cir. 1977) ("To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether."); Nat'l. Black Media Coalition v. FCC, 791 F.2d 1016, 1023 (2nd Cir. 1986) ("non-disclosure ... prevent[s] petitioners and perhaps others from making relevant comment").

In sum, CTIA seeks to deny the CPUC its lawful right to review and respond completely to evidence placed in the record by CTIA. Such denial is particularly egregious in this case where the CPUC's existing authority to oversee cellular rates to ensure that they are just and reasonable to California consumers is at stake. To allow CTIA to hide behind undisclosed data in seeking to defeat the CPUC petition is patently unfair and cannot reasonably be permitted.

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WHEREFORE, inasmuch as CTIA has refused to produce all data reviewed or relied upon by CTIA in its opposition, and inasmuch as the time has elapsed to allow the CPUC to respond fully to CTIA's opposition, the CPUC respectfully requests that the FCC grant the CPUC's Motion to Strike Affidavit and Testimony of Jerry A. Hausman Appended to and Discussed in the Opposition of CTIA.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
ELLEN S. LEVINE

By:


Ellen S. Levine

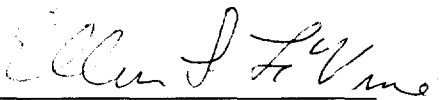
Attorneys for the People
of the State of California
and the Public Utilities
Commission of the State of
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October 18, 1994

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 18th day of October, 1994 a true and correct copy of the foregoing REPLY TO OPPOSITION OF CTIA TO CPUC EMERGENCY MOTION TO COMPEL PRODUCTION OF INFORMATION was mailed first class, postage prepaid to all known parties of record.



Ellen S. LeVine

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